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published in
Good Administration and the Council of Europe
2020

DOI (link to publisher)
10.1093/oso/9780198861539.003.0008

document version
Publisher's PDF, also known as Version of record

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Link to publication in VU Research Portal

citation for published version (APA)
Gerards, J., Van Ommeren, F., & Wolswinkel, J. (2020). The Dutch paradox: The impact of the pan-European general principles of good administration in the Netherlands. In U. Stelkens, & A. Andrijauskait (Eds.), *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (pp. 210-241). (Oxford Scholarship Online). The Oxford University Press. https://doi.org/10.1093/oso/9780198861539.003.0008

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The Dutch Paradox

The Impact of the Pan-European General Principles of Good Administration in the Netherlands

Janneke Gerards, Frank van Ommeren, and Johan Wolswinkel

I. Introduction

1. General Issues: The Netherlands and the CoE

7.01 The Netherlands is one of the founding fathers of the Council of Europe (CoE). Indeed, a congress in The Hague in 1948 formed an important basis for its establishment.[1] Currently, the Netherlands is a signatory to 171 of the 223 treaties, protocols, and conventions that have been drafted within the CoE's framework and it has ratified 160 of these (cf. M. 7.26).

7.02 Thus, the CoE would seem to be very important for the Netherlands. In practice this is certainly true for the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but the impact of other CoE Conventions and soft law on Dutch law is highly diverse. In some areas the impact is significant. In social security and migration case law, legislation, and policy, for example, much attention is paid to the findings of the European Committee of Social Rights (ECSR) regarding the right to minimum subsistence and housing of persons illegally staying in the Netherlands (cf. MN. 7.76 et seq.).[2] By contrast, only few references are made to CoE documents in case law on environmental or planning issues.[3]

7.03 In yet other areas of administrative law the influence is limited to very specific topics. For example, in relation to measures to protect women against domestic violence or exploitation, mention is sometimes made of the CoE's Convention on preventing and combating violence against women and domestic violence (cf. MN. 1.56).[4] In relation to a bill on compulsory care for persons of unsound mind the government paid attention to Recommendation

[1] N. Weiß, 'Origin and further development' in S. Schmahl and M. Breuer (eds.), *The Council of Europe—Its Law and Policies* (2017), pp. 3–22 (MN. 1.14 et seq.). The Netherlands signed the SCoE on 5 May 1949 and ratified it on 5 August 1949, which also was the day the SCoE entered into force.

[2] See in detail in J.H. Gerards, 'De rechtskracht van niet-bindende uitspraken van verdragscomités op het terrein van de grondrechten' in J.H. Gerards, B. J. Schueler, M. W. Scheltema, and A. R. Neerhof (eds.), *Hybride bestuursrecht* (2017), pp. 11–85.

[3] e.g., ABRvS 30 June 2010, ECLI:NL:RVS:2010:BM9701; ABRvS 9 October 2013, ECLI:NL:RVS:2013:1454.

[4] e.g., ABRvS 11 January 2017, ECLI:NL:RVS:2017:19; see also, e.g., the Explanatory Memorandum to a bill to regulate prostitution and combat abuses in the sex industry (*Kamerstukken II* 2013/14, 33885, No. 3).

Janneke Gerards, Frank van Ommeren, and Johan Wolswinkel, *The Dutch Paradox: The Impact of the Pan-European General Principles of Good Administration in the Netherlands* In: *Good Administration and the Council of Europe: Law, Principles, and Effectiveness.* Edited by: Ulrich Stelkens and Agnė Andrijauskaitė, Oxford University Press (2020). © The Several Contributors. DOI: 10.1093/oso/9780198861539.003.0008.

Rec(2004)10 of the Committee of Ministers of the CoE concerning the protection of the human rights and dignity of persons with mental disorders.[5] Further, in its explanatory memorandum accompanying a bill on anti-doping policy and the establishment of an anti-doping authority, the government mentioned the CoE's Anti-Doping Convention.[6]

7.04 Finally, with regard to transversal issues of administrative law, the impact of CoE documents seems to be rather marginal. As for the mayor codifications of general administrative law (MN. 7.10 et seq.), parliamentary documents contain hardly any references to CoE documents. However, some references in parliamentary documents, e.g. to the CM Recommendation No. R (91) 1 on administrative sanctions (cf. MN. 1.65) and the European Charter for Regional or Minority Languages (cf. MN. 1.56), indicate that attention to the CoE is not totally absent when adopting general rules of administrative law in legislation (cf. MN. 7.50 et seq.).

7.05 Hence, the impact on Dutch administrative law of the CoE's work appears to be rather uneven. No systematic studies have been undertaken that can help explain this 'Dutch paradox' but it is likely to be due to the sheer number of international instruments the Netherlands subscribes to; unavoidably this will have the effect of watering down the impact of individual CoE instruments. Moreover, in several areas where the CoE documents might be of considerable importance, other international instruments have proven to be more attractive to Dutch legal practice.

7.06 EU law often dominates legislation and case law, but the ECHR also plays an all-important role.[7] The European Court of Human Rights (ECtHR) has developed a coherent and readily accessible body of case law in nearly all areas of administrative law, varying from migration law and environmental law to social security law and administrative procedure. It turns out that most lawyers find it easier to concentrate on this case law than to try to find a way through the labyrinth of other CoE Conventions and (non-binding) soft law. Indeed, ECtHR judgments are closely followed by nearly all Dutch lawyers. ECtHR case law forms an inherent part of the curriculum at law schools as well as of professional training; most law journals regularly report on new developments 'in Strasbourg'. ECtHR judgments are routinely referred to in court briefs, judgments, administrative decisions, policy documents, municipal by-laws, explanatory memoranda, and parliamentary debates. For the great majority of lawyers it seems that the CoE simply *is* the ECHR, and institutions such as the CM and the Parliamentary Assembly of the CoE (PACE) are there merely to support the ECtHR's work and supervise the execution and implementation of its judgments.

[5] See e.g., the Explanatory Memorandum (*memorie van toelichting*) (*Kamerstukken II* 2009/10, 32399, No. 3).

[6] CETS No. 135 (which incidentally already entered into force for the Netherlands in 1995); *Kamerstukken II* 2015/16, 34543 No. 3.

[7] See elaborately M. Claes and J. H. Gerards, 'National report—The Netherlands' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn, Vol 1* (2012), pp. 613–77; J. H. Gerards and C. Sieburgh (eds.), *De invloed van fundamentele rechten op het materiële recht* (2013); J. H. Gerards and J. W. A. Fleuren, 'The Netherlands' in J. H. Gerards and J. W. A. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (2014), pp. 217–60.

2. Methodology and Set-Up of the Chapter

7.07 Against the background of this first impression the main question to be discussed in this chapter is to what extent and how the pan-European general principles of good administration influence Dutch administrative law, in particular as compared to the principles following from the case law of the ECtHR. To obtain sufficient data to answer this question we have conducted quick scans using a number of major databases. To trace the impact of the CoE's conventions and soft law on Dutch case law we have searched the database www.rechtspraak.nl, on which almost all relevant Dutch case law since 2000 is published full-text. We have searched for the period 1 July 2007 to 1 July 2017, selecting only the judgments of the highest administrative courts and looking for hits on terms like 'Council of Europe' (*Raad van Europa*), 'Parliamentary Assembly' (*Parlementaire Vergadering/Assemblee*) and 'Committee of Ministers' (*Comité van Ministers*). We have made similar searches for legislation and parliamentary documents (albeit for a shorter period, from 1 July 2015 until 1 July 2017) via the database www.officielebekendmakingen.nl. This database contains full-text versions of all Dutch legislation (both Acts of Parliament and lower legislation, such as government decrees) and all parliamentary documents, ranging from explanatory memoranda to parliamentary questions and transcripts of parliamentary deliberations. Finally, we have made searches for the relevant ombudsprudence via the database www.nationaleombudsman.nl, using similar search terms to those mentioned above. We have analysed the documents obtained through these searches (about 250 for case law, about 300 for legislation and parliamentary documents) for the nature and relevance of the references made. We have supplemented the quick scan with a study of literature on the impact of the ECHR on Dutch law, which in the Netherlands is a widely researched subject. Since this allowed us to rely on recent and relevant research data we have conducted no further research into primary sources relating to the impact of the ECHR.

7.08 The results of our analyses are presented hereafter. We start with a short characterization of Dutch administrative law (MN. 7.09 et seq.) and a general description of the effect of international treaties and binding and non-binding decisions of international organizations in the Dutch legal system (cf. MN. 7.26 et seq.). Having clarified this we explain the 'Dutch paradox' by discussing the actual impact of the pan-European principles through legislation and case law (MN. 7.33 et seq.). We do so by first presenting how principles of good administration impact Dutch administrative law through application of the ECHR. To facilitate comparison we then present four case studies (MN. 7.49 et seq.) which show how and to what degree legislation and case law are influenced by CoE law other than the ECHR: CoE Conventions, CoE soft-law instruments and non-binding decisions, and other European law sources (EU law, judgments of the ECtHR). These four case studies are the European Charter of Local Self-Government, the CoE Convention on Access to Official Documents, the CoE Convention on Protection of Individuals with regard to Automatic Processing of Personal Data, and decisions of the ECSR regarding the rights of undocumented aliens. In addition we briefly address the question of whether and to what extent Dutch courts may rely on non-binding CoE documents given a lack of a binding legal basis in either Dutch law or the ECHR (MN. 7.83 et seq.). We also set out whether other institutions—such as the National Ombudsperson—might play a role in giving shape to principles of good administration and/or good governance in the Dutch administrative law system (MN. 7.89 et seq.).

Finally, we present a number of conclusions which can be derived from these analyses on the role that pan-European principles of good administration play in Dutch administrative law (MN. 7.91 et seq.).

II. Dutch Administrative Law in a Nutshell

1. A Separate Field of Law

7.09 To obtain a profound understanding of the possible added value of CoE instruments to Dutch administrative law, it is necessary to start with a short characterization of Dutch administrative law. As in many European countries, administrative law in the Netherlands is a relatively young field of law. Although there are some important predecessors, this part of law really came into force after World War II, when the welfare state came into being and the role of the government changed rapidly. These changes brought along an important growth of legislation with a strong instrumental character. At the same time this new branch of statutory law gave rise to the development of a separate branch of courts of law that had to provide judicial protection against the administrative decisions based on these acts: the administrative courts. This culminated in the establishment of the first general administrative court in 1976 (*Arob-rechter)*.

7.10 Presently the Netherlands has a full-fledged body of general administrative law which is conceived of as a separate part of law, i.e., apart from private law. Dutch administrative law does not only consist of a multitude of specific administrative law statutes—which concern many administrative fields of law (e.g. migration law, housing law, environmental law, planning law, law of telecommunications, etc.)—but also includes some statutes containing general rules of administrative law. Within this set of general legislation on administrative law the General Administrative Law Act (*Algemene wet bestuursrecht—Awb*) is not the only one[8] but without doubt the most important piece of legislation in the field (cf. MN. 7.19). This act, which intends to cover the field of administrative law as whole, contains both a sizeable part of substantive law and procedural provisions for judicial protection.[9]

7.11 Due to its fragmentary development, the Dutch system of legal protection currently has a rather complex system of administrative courts, especially at the level of appeal. For the purposes of this study it suffices to state that there are four administrative courts of last resort: the Administrative Law Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State—ABRvS*), with a rather general jurisdiction over administrative law cases, the Central Appeals Tribunal (*Centrale Raad van Beroep—CRvB*) for civil service and social security cases, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven—CBb*) for administrative law cases of an economic nature, and the Supreme Court (*Hoge Raad der Nederlanden—HR*) for tax law cases.[10]

[8] On the relationship between the *Algemene wet bestuursrecht* and the *Wet openbaarheid van bestuur*, see MN. 7.59.

[9] See on the General Administrative Law Act: T. Barkhuysen, W. den Ouden, and Y.E. Schuurmans, 'Netherlands' in J.-B. Auby (ed.), *Codification of Administrative Procedure* (2014), pp. 253–76.

[10] See: R. Seerden and F. Stroink, 'Administrative Law in the Netherlands' in R. J. G. H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (2007), pp. 155–219.

7.12 Recently, much attention has been paid to cooperation between these four administrative courts. Apart from informal cooperation the introduction of two new mechanisms in 2014 illustrate the importance attached to issues in the development and unity of (case) law: the office of Advocates-General for administrative law for the highest administrative courts, and the possibility of deciding in a 'grand chamber' with members of different highest administrative courts.[11] Advocates-General can be asked by the ABRvS to provide non-binding opinions, like EU Advocates-General. There are presently two Advocates-General for administrative law. These new mechanisms have already delivered a firm contribution to the development of administrative law, including the general principles of administrative law and of good administration.

7.13 The task of the administrative courts is to provide judicial protection against a whole range of governmental actions by applying the substantive and procedural administrative law legislation and other principles and rules of administrative law. The administrative courts, however, do not cover the whole area of administrative law. In addition to the administrative courts the civil courts (including the civil court of last resort, the *Hoge Raad*) offer judicial protection against governmental actions and omissions. The civil courts are especially important in the fields of public contract law[12] and public liability law.[13] Apart from these fields the civil courts have a general residual competence: the civil courts are competent in cases where there is no competence for an administrative court. In this way there is always a competent court to fill the gaps in judicial protection against government actions.[14]

7.14 Thus, the emergence of the general principles of administrative law can only be understood if due account is taken of the role of the *Hoge Raad*. Indeed, a typical characteristic of Dutch administrative law is that the *civil* courts apply acts and laws of a *public* or administrative law nature.[15] This explains why traditionally the *Hoge Raad* has been an important actor in the development of public law and administrative law rules and principles. To a lesser extent it still performs this function today.

2. General Principles of Administrative Law and of Good Administration

7.15 For the purposes of assessing the impact of the pan-European general principles of good administration on Dutch administrative law it is necessary to pay attention to the specific role of general principles of administrative law. The development of general legal principles in the Dutch legal system is a time-consuming process. It can take many years, even decades, before a new legal principle is fully acknowledged as part of the legal system. The

[11] The tax law chamber of the HR had the office of an attorney-general already long before.

[12] F. van Ommeren, P. Huisman. and C. Jansen, 'Judicial and extra-judicial protection regarding public contracts in the Netherlands' in L. Folliot-Lalliot and S. Torricelli (eds.), *Administrative oversight and judicial protection for public contracts* (2017), pp. 157–81.

[13] C. van Dam, 'Liability of Public Authorities in the Netherlands' in D. Fairgrieve, M. Andenas, and J. Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (2002), pp. 559–69.

[14] HR 31 december 1915, NJ 1916, 416 (Guldemond/Noordwijkerhout); G. Jurgens and F. van Ommeren, 'The Public-Private Divide in English and Dutch Law: a Multifunctional and Context-Dependent Divide', (2012) 71 *Cambridge Law Journal*, pp. 172–99 (pp. 181 et seq.).

[15] HR 27 March 1987, NJ 1987, 251 (Amsterdam/Ikon); Jurgens and van Ommeren (n. 14), pp. 172–99 (pp. 191 et seq.).

courts have always played and still play an important role in this process. This may seem surprising because the Dutch legal system, as a continental law system, typically belongs to the civil law systems. However, case law still has a certain degree of precedential effect. The courts take earlier judgments seriously into account, although they are empowered to modulate previous judgments when in their opinion the circumstances force them to decide so. By doing so they can gradually build a certain set of well-established notions or interpretations, including certain general principles of administrative law.

7.16 For the purposes of assessing the impact of CoE law it is worth emphasizing that the courts have not derived the Dutch general principles of administrative law from constitutional principles nor do they have other sources in the Netherlands Constitution (*Grondwet—Gw*);[16] the only exception is the principle of equality, which is codified in Article 1 Gw. In fact, the general principles mostly originate from public liability law and general administrative statutory law.

7.17 Chronologically, the development of the general principles of administrative law made a modest start before World War II in the civil service case law of the CRvB and in the public liability case law of the *Hoge Raad*. This transformative development took place not only in the civil courts but also in the administrative courts, especially after World War II. It was led and inspired by legal scholars such as Wiarda, who became president of the ECtHR (1981–85).[17]

7.18 The most important general principles of administrative law currently crystallized in the case law are the prohibition of *ultra vires* acts by the administrative bodies, the prohibition of *détournement de pouvoir*, the prohibition of arbitrariness, the principle of equality, the principle of legal certainty, the principle of legitimate expectations, the principle of proportionality, the principle of due care, and the duty to state reasons. These *general principles of administrative law* do not constitute a fixed set of norms; the process of finding new general principles of administrative law through case law is still ongoing, just like the refinement and modification of their legal meaning.

7.19 Due to their background in case law the general principles of administrative law were generally considered to form part of 'unwritten' law, which means that they are not laid down in the 'written' law of treaties, statutes, decrees, etc. This is still partly true. However, a milestone in their development is their *partial codification* in the Awb (cf. MN. 7.10) in 1994. Some of the general principles of administrative law, like the principle of due care and the duty to state reasons, are elaborated in various specific and very detailed rules in the Awb.[18] Other general principles of administrative law, like the principle of proportionality, are codified in the Awb only in general terms.[19]

[16] For a short characterization of the *Grondwet* as 'unostentatious, simple, sober and short' see L. Besselink and M. Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution' in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), pp. 179–220 (pp. 182 et seq.).

[17] See in more detail: P. Nicolaï, *Beginselen van behoorlijk bestuur* (1990), pp. 79 et seq.

[18] See for the principle of due care: Article 3:2, 3:4 (1) and many articles of chapter 4 Awb–a few will be mentioned hereafter; see for the duty to state reasons: Article 3:46-3:50 Awb.

[19] Article 3:4 (2) Awb. On this principle, refer to J. H. Gerards, 'Het evenredigheidsbeginsel van art. 3:4 lid 2 Awb en het Europese recht' in T. Barkhuysen, W. den Ouden, and E. Steyger (eds.), *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht* (2007), pp. 73–113.

7.20 In addition to the Awb there is other legislation in which general principles of administrative law have been codified. Next to Article 1 Gw,[20] which contains the equality principle, reference can be made to the duty to state reasons, which is also laid down in the Public Procurement Act 2012 (*Aanbestedingswet 2012*).[21] Many aspects of the principle of due care are furthermore elaborated in various sector-specific administrative acts which contain provisions for specific social or economic areas.

7.21 A related, very important, feature of administrative law is that even after codification of (certain elements of) a principle of administrative law the principle does not lose its meaning as an *unwritten* general legal principle. This is because codification in a statutory act very rarely covers the general principle completely. Moreover, unwritten general principles of administrative law have never lost their relevance simply because some of them have not been codified in statutory law at all. The principle of legitimate expectations, for instance, has never been laid down in administrative law legislation because its scope and force are considered to be too broad and too vague. This emphasizes the ongoing importance of conceiving the general principles of administrative law as a body of unwritten law too. Finally, it is worth mentioning that courts use statutory law and case law to 'recognize' the development of a new legal principle, as well as recommendations, comments, and statements of other national and international legal actors.

7.22 A very recent step in the development of Dutch administrative law is the acknowledgement of general principles that are not a clear and distinct part of the law but play an important role in day-to-day administrative practice. These principles are designated as principles of *good administration or good governance*.[22] This is an open category of principles and values. Often-mentioned examples in literature are the principle of openness, the principle of integrity, the principle of fairness, the principle of participation, the principle of accountability, and the principle of effectiveness. Another value that is an integrated part of good governance is the idea of responsiveness of the administration.[23] The principles of good administration are often part of (non-binding) policy rules, codes of governance,[24] and other pieces of soft law.

7.23 It is important to emphasize the difference between the general principles of administrative law and these general principles of good administration in Dutch law. It goes without saying that the general principles of administrative law are part of the law. By contrast the general principles of good administration are not a real part of the law. This means that

[20] J. H. Gerards, *Judicial Review in Equal Treatment Cases* (2005).

[21] Article 1.4 (3) Aanbestedingswet 2012. On the relationship between the general principles of administrative law and the Aanbestedingswet 2012: M. Scheltema, 'De nieuwe Aanbestedingswet: een duurzaam bouwwerk?' in *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet* (2010), pp. 123–53 (pp. 127–31).

[22] See elaborately H. Addink, *Good Governance—Concept and Context* (2019), p. 19 and pp. 99–182.

[23] G. H. Addink, 'Algemene beginselen van goed bestuur en de toepassing daarvan door de Algemene Rekenkamer', (2005) 23 *Nederlands Tijdschrift voor Bestuursrecht*, pp. 169–83 (pp. 169 et seq.); G. H. Addink, 'Het concept van 'goed bestuur' in het bestuursrecht en de praktische consequenties daarvan', (2012) 4 *Ars Aequi*, pp. 266–75 (pp. 266 et seq.).

[24] Inter alia J. W. J. Besemer, 'Horizontaal verantwoorden', (2007) 28 *Nederlands Tijdschrift voor Bestuursrecht*, pp. 195–203 (pp. 195 et seq.), about the 'Handvest Publieke Verantwoording' see C. H. C. Overes, 'De stichting en governance: bestuur en toezicht' in M. L. Lennarts, W. J. M. van Veen, and D. F. M. M. Zaman (eds.), *De stichting* (2011), pp. 61–81 (pp. 72–74); F. J. van Ommeren, 'De betekenis van de governancebenadering voor het onderscheid tussen publiek—en privaatrecht' in C. H. C. Overes and W. J. M. van Veen (eds.), *Met recht betrokken. Opstellen aangeboden aan prof. mr. T.J. van der Ploeg* (2012), pp. 216–29 (pp. 222 et seq.).

the general principles of administrative law and the general principles of good administration strongly differ in legal force. The general principles of administrative law have a very high legal status.[25] Most official decisions by the administration are amenable to annulment when they infringe a principle of administrative law: not only individual decisions but also subordinate legislation have to meet the requirements of the general principles of administrative law. If a general principle of administrative law is violated by an administrative decision the decision is legally invalid. By contrast the principles of good administration are, legally speaking, non-binding principles. If the administration does not comply with a general principle of good administration this behaviour is objectionable from the viewpoint of good governance but is not considered to be illegal. A classic example is a decision by the administration that turns out to be ineffective: although such a decision violates the general principle of effectiveness the administrative body does not breach the law by taking it.

7.24 Potentially, a general principle of good administration can transform into a general principle of administrative law over time. A general principle that is currently situated on the edge of the sphere of good administration and the sphere of general administrative law would be the principle of transparency (cf. MN. 7.98). At the moment this principle is still not fully recognized as a principle of good administration in administrative law case law,[26] possibly because the courts cannot oversee in advance all the possible consequences that would result from acknowledging a binding general legal principle of transparency.[27] Therefore, as the law currently stands, such a principle of good governance could transform into a general principle of administrative law only if the legislature were to codify it as a legal principle.[28]

7.25 While administrative courts do not play a dominant role in the development of the principles of good administration some other authorities in the Netherlands are equipped to develop and apply these principles. This holds in particular for the National Ombudsperson (*Nationale Ombudsman*) and the National Court of Audit (*Algemene Rekenkamer*). Since the opinions of the National Ombudsperson are legally non-binding and do not establish real legal precedents the Ombudsperson has the opportunity to elaborate the principles of good administration without worrying about their legal consequences (cf. MN. 7.89). Also, for an institution like the *Algemene Rekenkamer* it is relatively easy to contribute to developing the principles of good administration. Since its primary task is to control the expenditure of the national government the *Algemene Rekenkamer* is, rather more than a court of law, focused on the accountability and effectiveness of administrative actions. When evaluating the propriety (instead of the lawfulness) of administrative behaviour it does not need to be much concerned about whether these principles are legally binding.

[25] As confirmed very recently in No 6.11 of the opinion of the A-G: ECLI:NL:NL:RVS:2016:1421. See also: R. Widdershoven, 'Een ervaring als staatsraad advocaat-generaal: op zoek naar een rechtsbeginsel' in M. Bosma, B. J. van Ettekoven, O. van Loon, H. Lubberdink, J. de Poorte, and B. Schueler (eds.), *De conclusie voorbij. Liber amicorum aangeboden aan Jaap Polak* (2017), pp. 87–101 (pp. 91, 92).

[26] See C. J. Wolswinkel, *De verdeling van schaarse publiekrechtelijke rechten. Op zoek naar algemene regels van verdelingsrecht* (2013), pp. 307 et seq.; A. Drahmann, *Transparante en eerlijke verdeling van schaarse besluiten* (2015), pp. 317 et seq., C. J. Wolswinkel, 'Concession Meets Authorisation', (2017) *European Public Procurement Law Review*, pp. 396–407.

[27] F.J. van Ommeren, 'Schaarse vergunningen: het beginsel van gelijke kansen als rechtsgrondslag' in Bosma, van Ettekoven, van Loon, Lubberdink, de Poorte, and Schueler (n. 25), pp. 191–208 (pp. 196–98).

[28] Widdershoven (n. 25), p. 92.

III. Reception of the Pan-European General Principles of Good Administration through Ratifying CoE Conventions

1. Legal Status of Rules of International Law and their Place in the Hierarchy of Norms

7.26 As already mentioned the Netherlands is a signatory to 171 CoE Conventions, of which it has ratified 160 (cf. MN. 1.06). The eagerness of the Netherlands to accept most CoE Conventions is in line with its traditional openness to international law. Ever since its articles on foreign relations were significantly amended in 1953, the *Grondwet* has opened with the constitutional duty of the Government to promote the development of the international legal order (Article 90 Gw).[29] Rules of international law (treaties, resolutions of international organizations, rules of customary international law) are part of the law of the land as soon as they have become binding on the Netherlands (Article 93 Gw).

7.27 Moreover, as may be inferred from the *Grondwet* (cf. MN. 7.29), law of domestic origin is subordinate to rules of international law. In the Kingdom of the Netherlands international law outranks national legal rules in the hierarchy of law, including the Constitution and (it must be assumed) the Charter for the Kingdom.[30] However, the power of the courts to disapply the *Grondwet*, Acts of Parliament, and subordinate legislation in cases where application would be inconsistent with rules of international law is restricted to those rules that are embodied in self-executing provisions of treaty law[31] (cf. MN. 7.30 et seq.).

7.28 Although Article 94 Gw specifically provides for the remedy of disapplication of legislation that is incompatible with self-executing rules of international law, in practice this is only one of the methods or techniques used by courts. Indeed, in most cases, the Dutch courts aim to apply and construe national law in such a way that violation of international law is avoided by '*verdragsconforme interpretatie*' ('treaty conform interpretation' or 'harmonious interpretation').[32]

2. Self-Executing Provisions of Treaty Law

7.29 Since the concept of a self-executing provision of treaty law plays a vital role in the relationship between Dutch law and international law, including CoE instruments, it may be useful

[29] For an analysis of this provision see L. F. M. Besselink, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', (2003) 34 *Netherlands Yearbook of International Law*, pp. 89–138.

[30] J. G. Brouwer, 'The Netherlands' in D. B. Hollis, M. Blakeslee, and B. Ederington (eds.), *National Treaty Law and Practice* (2005), pp. 482–536 (pp. 482, 498–99); J. W. A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (2004), pp. 338–40.

[31] See, e.g., HR 18 September 2001, ECLI:NL:HR:2001:AB1471 (for a translation in English see *ILDC* 80 (NL 2001); HR 8 July 2008, ECLI:NL:HR:2008:BC7418 (for a translation in English see ECLI:NL:HR:2008:BG1476).

[32] HR 16 November 1990, ECLI:NL:HR:1990:ZC0044. See also J. de Wit, *Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden 'vinden geen toepassing' in artikel 94 van de Grondwet* (2012). For an extensive discussion of case law, see J. W. A. Fleuren, 'Directe en indirecte toepassing van internationaal recht door de Nederlandse rechter', (2005) 131 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, pp. 69–144 (pp. 69, 85–98).

to explain briefly the Dutch approach to defining the notion of self-executing provisions. According to Article 93 Gw:

> Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents, shall become binding after they have been published.

This means that these provisions shall have force of law in regard to all natural and legal persons after they have been published. As soon as such provisions have become binding on all persons they may prevent the application of national legislation (Article 94 Gw).

7.30 Currently, according to the *Hoge Raad*, the question of whether or not the contracting parties intended a provision of treaty law to be self-executing (i.e., to have direct effect) is only relevant when they either clearly wanted the provision to have a direct effect, or, on the contrary, when they clearly agreed that no such direct effect should be given.[33] Except for this situation the content of the provision is decisive. The accepted standard is that there is no direct effect if the provision entails an obligation on the Dutch legislature to adopt statutory regulations along the lines indicated by the provision. If the provision can in itself operate as law ('*objectief recht*') within the domestic legal order, direct effect is accepted. It might be inferred from a 2011 judgment of the *Hoge Raad* that this will be the case if the provision is unconditional and sufficiently precise to be applied by the courts.[34]

3. Prohibition of Constitutional Review of Acts of Parliament

7.31 To understand the major role of international law in Dutch administrative law it is also important to note that under Article 120 Gw courts are prohibited from reviewing the constitutionality of Acts of Parliament and there is no constitutional court. The power of courts to review legislation for compatibility with the *Grondwet* as well as fundamental principles of law is limited to administrative decisions as well as subordinate legislation such as government decrees, ministerial decrees, provincial and municipal regulations, and by-laws.

7.32 For a variety of reasons, however, it is rather uncommon to review even such administrative decisions and subordinate legislation for their compatibility with the *Grondwet*. Most importantly, the provisions of the *Grondwet* have not been written with their application in judicial procedures in mind—for example, most fundamental rights provisions merely determine the competence to regulate the exercise of these rights without offering any substantive standards on how this should be done.[35] Since such standards and criteria are readily available in international treaties (in particular the ECHR, cf. MN. 7.33 et seq.), which have direct effect and priority anyway, many lawyers and judges have developed the habit of referring to rules of international law instead of constitutional provisions.[36]

[33] HR 30 May 1986, ECLI:NL:HR:1986:AC9402 (for a translation in English see 18 *NYIL* (1987), p. 389); HR 18 April 1995, ECLI:NL:HR:1995:AD4656.

[34] HR 1 April 2011, ECLI:NL:HR:2011:BP3044.

[35] J. H. Gerards, 'Oordelen over grondrechten–rechtsvinding door de drie hoogste rechters in Nederland' in H. den Tonkelaar and L. de Groot (eds.), *Rechtsvinding op veertien terreinen* (2012), pp. 9–51.

[36] Besselink and Claes (n. 16), p. 183 et seq. This is true in particular for cases about fundamental rights issues; see Gerards (n. 35), pp. 9–51.

IV. Reception of the Pan-European General Principles of Good Administration through the Application of the ECHR

1. Legal Status of the ECHR in the Netherlands

7.33 The Netherlands was one of the first states to sign and ratify the ECHR on 4 November 1950 in Rome. However, it did not manage to finish the process of parliamentary approval in time to belong to the group of states who became a party to the ECHR on the date of its entering into force, i.e. 3 September 1953. Instead the ECHR, together with its Protocol No. 1, entered into force for the Netherlands on 31 August 1954.[37] At first the government hesitated as to whether it should accept the compulsory jurisdiction of the ECtHR—some argued it would be enough that, according to the *Grondwet*, alleged victims could invoke the ECHR before the Dutch courts.[38] Nevertheless, on 5 July 1960 both the right of individuals to complain in 'Strasbourg' and the compulsory jurisdiction of the ECtHR were finally recognized by the Netherlands.[39]

7.34 The Netherlands has become a party to all the Protocols to the ECHR except for Protocol No. 7, which it has never ratified. In 2004 the responsible ministers explained that the government objected to a general right to appeal in criminal cases as laid down in Article 2 of Protocol No. 7.[40] It was important to retain sufficient flexibility for not granting an appeal, for instance in cases of light criminal offences, especially because of considerations of expediency. If appeals would have to be allowed in all such cases this would be time-consuming and could endanger another right granted by the ECHR, i.e., the right to a trial within a reasonable time.

7.35 The substantive provisions of the ECHR and the Protocols to which the Netherlands is a party are considered by the courts to be 'binding on all persons' within the meaning of Articles 93 and 94 Gw. In other words they are self-executing or have direct effect.[41] In the past the courts used to rule that Article 13 ECHR lacked direct effect[42] but this case law is outdated.[43]

2. Overall Impact of the ECHR on Dutch Administrative Law

7.36 Until the end of the 1970s the ECHR had little impact on Dutch administrative law.[44] In the 1980s, however, this changed rapidly. The ECtHR's case law thereafter had a particular impact on administrative law. The judgments of the ECtHR on effective remedies in relation to

[37] *Trb* 1954, 151.

[38] Y. S. Klerk and L. van Poelgeest, 'Ratificatie à contre coeur: de reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht', (1991) *Rechtsgeleerd Magazijn Themis*, pp. 220–46.

[39] *Trb* 1961, 8.

[40] Letter of the Minister of Justice to the Parliament, *Kamerstukken II* 2004/05, 29 800 VI, No. 9.

[41] See further J. W. A. Fleuren, 'The application of public international law by Dutch courts', (2010) 57 *Netherlands International Law Review*, pp. 245–66 (p. 245).

[42] e.g., HR 18 February 1986, ECLI:NL:HR:1986:AC9229; ARRS 26 July 1983, ECLI:NL:RVS:1983:AM7262.

[43] See, e.g., ABRvS 9 June 1994, ECLI:NL:RVS:1994:AN4196.

[44] For an overview of the older Dutch case law on the ECHR and other human rights treaties see A. W. Heringa and J. G. C. Schokkenbroek (eds.), *Repertorium Nederlandse Rechtspraak Mensenrechtenverdragen* (1993).

sanctions, starting with *Engel*[45] and *Öztürk*,[46] made it clear that certain disciplinary administrative law penalties had to be regarded as 'criminal charges' (cf. MN. 1.46) and, accordingly, their imposition should comply with the requirements of Articles 5 and 6 ECHR.[47] Similarly, the judgments in *Ringeisen*[48] and *König*[49] showed that Article 6 (1) ECHR under its civil heading applied to certain administrative law issues (cf. MN. 1.45). This was all the more important for the Netherlands as the ECtHR had held in its *Golder* judgment that Article 6 ECHR implied an individual right to access to a court.[50] The Netherlands administrative law system at the time hardly provided for such access. Instead, it mainly provided for review of administrative law acts by higher administrative bodies (*administratief beroep*) with the Crown (*Kroon*)—the central government—as the highest instance.

7.37 In 1985 the landmark case of *Benthem*[51] made it abundantly clear that this system could no longer be sustained without violating Article 6 ECHR since it did not provide for individual legal protection by an independent and impartial court.[52] This judgment led to a complete overhaul of Dutch administrative law, culminating in the introduction of the Awb in 1994.[53]

7.38 Also, after the new system had come into effect, the ECtHR's judgments continued to have an influence on the development of administrative law and administrative procedure in the Netherlands. For example, the judgments in *Procola*[54] and *Kleyn*[55] sparked an intense (as yet unfinished) debate on the objective impartiality of one of the high administrative courts in the Netherlands, the ABRvS, which forms part of the same Council of State that is also the highest advisory body for the legislature.[56]

7.39 Other examples of influence on Dutch administrative law are the systems for compensation in cases of delays in judicial proceedings which high administrative courts have introduced in response to judgments of the ECtHR,[57] the discussions on the consequences of the case

[45] *Engels and Others v. Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 1976 ECtHR [Plenary].

[46] *Öztürk v. Germany* (8544/79) 21 October 1984 ECtHR [Plenary].

[47] See further, e.g., N. Verheij, 'Onder dexel van politie. Het Nederlandse bestuursrecht onder het EVRM' in A. W. Heringa, J. G. C. Schokkenbroek, and J. van der Velde (eds.), *40 Jaar Europees Verdrag voor de Rechten van de Mens. Opstellen over de ontwikkelingen van het EVRM in Straatsburg en in Nederland 1950–1990* (1990), pp. 225–48 (p. 232).

[48] *Ringeisen v. Austria* (2614/65) 16 July 1971 ECtHR at [94].

[49] *König v. Germany* (6232/73) 28 June 1978 ECtHR [Plenary] at [88] et seq.

[50] *Golder v. UK* (4451/70) 21 February 1975 ECtHR [Plenary].

[51] *Benthem v. Netherlands* (8848/80) 23 October 1985 ECtHR [Plenary].

[52] The impact of this judgment became even clearer as a result of a later judgment which showed that Article 6 ECHR did not only apply to concrete decisions but also to more general regulations such as municipal construction plans; see *Allan Jacobsson* v. *Sweden* (10842/84) 25 October 1989 ECtHR.

[53] See Verheij (n. 47), pp. 225–48 (p. 226 et seq.).

[54] *Procola v. Luxembourg* (14570/89) 28 September 1995 ECtHR.

[55] *Kleyn and Others v. Netherlands* (39343/98, 39651/98, 43147/98, 46664/99) 6 May 2003 ECtHR [GC].

[56] See, e.g., A. M. L. Jansen, 'Towards an Adjustment of the Trias Politica: the Administrative Courts as (Procedural) Lawmaker; a Study of the Influence of the European Human Rights Convention and the Case Law by the European Court of Human Rights on the Trias Politica, in particular the Position of Dutch Administrative Courts in relation to the Administration' in F. Stroink and E. van der Linden (eds.), *Judicial Lawmaking and Administrative Law* (2005), pp. 37–55. In Dutch, with many references to relevant literature on the consequences of *Procola*, see T. Barkhuysen, M. L. van Emmerik, and J. P. Loof, '50 Jaar EVRM en het Nederlandse staats—en bestuursrecht—ontwikkelingen en vooruitzichten' in R.A. Lawson and E. Myjer (eds.), *50 Jaar Europees Verdrag voor de Rechten van de Mens* (2000), pp. 327–408 (pp. 392 et seq).

[57] See, e.g., HR 17 June 2008, ECLI:NL:HR:2008:BD2578; ABRvS 26 March 2008, ECLI:NL:RVS:2008:BC7604; CRvB 23 January 2008, ECLI:NL:CRVB:2008:BC2942. See in more detail S. Jansen and C. Backes, 'Faster and better? Decision-making in the Netherlands' in C. Backes, M. Eliantonio, and S. Jansen (eds.), *Quality and speed in administrative decision-making: Tension or balance?* (2016), pp. 131–60.

law of the ECtHR (and the Court of Justice of the European Union (CJEU)) on the 'full jurisdiction' requirement[58] (cf. MN. 1.45), and the potential impact of the ECtHR's new approach to the right to access to public documents[59] (cf. MN. 1.48 et seq.) on Dutch legislation and policy.[60]

7.40 These examples show a constant and direct impact of ECtHR case law on the development of Dutch general administrative law and administrative procedure,[61] as well as of general principles of good governance.[62] The ECtHR's case law has also strongly influenced substantive administrative law, in particular in areas such as tax law, social security, migration law, and environmental and planning law.[63] For example, a series of judgments starting with *Öneryildiz*[64] caused many debates on protection of individuals against hazardous installations and on the question of how issues of regulation and supervision should be organized in such a way as to enable compliance with the positive obligations imposed by the ECtHR.[65]

7.41 Indeed, every Dutch lawyer is aware of the special meaning of the ECHR and its Protocols for virtually all areas of domestic law, including administrative law. Currently, judges and solicitors seem to be even more familiar with the rights entailed in the ECHR than with the rights embodied in the *Grondwet*,[66] and the same appears to be true for lawyers working for legislative and administrative bodies.

3. Impact of the ECHR on Legislation (and Administrative Bodies)

7.42 According to Articles 93 and 94 Gw (cf. MN. 7.29 et seq.) the substantive provisions of the ECHR and the Protocols entail a right to observance of the ECHR by the State and

[58] cf. *Sigma Radio Television Ltd v. Cyprus* (32181/04 and 35122/05) 21 July 2011 ECtHR and *Menarini Diagnostics v. Italy* (43509/08) 27 September 2011 ECtHR. See further, e.g., C. Albers, 'Bestraffend bestuur 2014. Naar een volwassen bestraffend bestuursrecht?' and M.L. van Emmerik and C.M. Saris, 'Evenredige bestuurlijke boetes', both in *Boetes en andere bestraffende sancties: een nieuw perspectief?* (2014); J. H. Gerards, T. Barkhuysen, and M.L. van Emmerik, 'De invloed van de Europese fundamentele rechten op het bestuursrecht' in B. J. Schueler (ed.), *Europeanisering van het algemeen bestuursrecht* (2014), pp. 33–56 (pp. 51 et seq.).

[59] Cf. *Társaság a Szabadságjogokért v. Hungary* (37374/05) 14 April 2009 ECtHR and *Magyar Helsinki Bizottság v. Hungary* (18030/11) 8 November 2016 ECtHR [GC].

[60] See in response, e.g., ABRvS 22 February 2017, ECLI:NL:RVS:2017:498, *AB* 2017/147 (case note J. Tingen, with references to earlier case law); see also, e.g., A. Klingenberg, 'Tijd voor verandering: leidt de Wet Open Overheid tot meer openheid?', (2017) 1 *Ars Aequi*, pp. 20–24.

[61] This is well-documented; for general reviews, see, e.g., Barkhuysen, van Emmerik, and Loof (n. 56), pp. 382 et seq.; A. M. L. Jansen, *Constitutionalisering van het bestuursprocesrecht* (2004); T. Barkhuysen and M.L. van Emmerik, 'Het EVRM als inspiratiebron en correctiemechanisme voor de Awb' in T. Barkhuysen, W. den Ouden, and J.E.M. Polak (eds.), *15 Jaar Awb: bestuursrecht harmoniseren* (2010), pp. 557–87; T. Barkhuysen and M. L. van Emmerik, 'Mensenrechten als waarborg voor toegankelijk, zorgvuldig, voortvarend en evenredig bestuursrecht', (2012) 2 *JBPlus*, pp. 180–94; Gerards, Barkhuysen, and van Emmerik (n. 58), pp. 33–56 (pp. 51 et seq.).

[62] See, e.g., Barkhuysen, van Emmerik, and Loof (n. 56), pp. 392 et seq, pp. 382 et seq.; Jansen (n. 61); J. H. Gerards, T. Barkhuysen, and M. L. van Emmerik (n. 58), pp. 51 et seq.; see specifically also H. Addink, 'Algemene beginselen van behoorlijk bestuur in de Nederlandse en Europese rechtspraak' in B. J. Schueler (ed.), *Europeanisering van het algemeen bestuursrecht* (2014), pp. 57–73 (pp. 71–73).

[63] This also has been well-documented; see, e.g., T. Barkhuysen, 'Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht' in *De betekenis van het EVRM voor het materiële bestuursrecht* (2004), pp. 7–114.

[64] *Öneryıldız v. Turkey* (48939/99) 30 November 2004 ECtHR [GC].

[65] See generally, e.g., D. Sanderink, *Het EVRM en het materiële omgevingsrecht* (2015).

[66] Gerards (n. 35), pp. 9–51.

all its public bodies, including all legislative and administrative bodies. The Dutch legislature actively strives to comply with the ECHR and the case law of the ECtHR for all Acts of Parliament. The general guidelines for legislation expressly refer to the ECHR and the standards developed by the ECtHR,[67] just like the various checklists that are used to guarantee the quality of legislation.[68]

7.43 National Ombudspersons and independent accountability agencies—such as the Data Protection Authority (*Autoriteit Persoonsgegevens—AP*) or the National Human Rights Institute (*College voor de Rechten van de Mens*)—also have the task of guaranteeing and supervising compliance with the ECHR by administrative and subordinate legislative bodies, but generally they do not regard this as their core business. Instead, when it is thought that a decision or a measure is not in conformity with the ECHR a case is usually brought before the Dutch administrative courts (or the civil courts if the legality of legislation is directly contested). Although references to the ECHR and underlying case law are certainly not absent in reports of the National Ombudsperson (e.g. with regard to freedom of demonstration) the impact of references to the ECHR for the development of issues of general administrative *law* seems limited. For that reason this section focuses on the role the Dutch administrative courts play in enforcing the ECHR and the principles of good administration developed in the ECtHR's case law.

4. Impact of the ECHR on Dutch Case Law

7.44 For the Dutch courts the ECHR is a very important instrument. As discussed above (cf. MN. 7.27 et seq.) the *Grondwet* allows the courts to apply the provisions of the ECHR directly and obliges them to disapply Acts of Parliament (and even the Constitution) if this is necessary to avoid a violation of the ECHR.[69] Nevertheless, there is no general legal obligation for the Dutch administrative courts to apply the ECHR *ex officio*. In most cases the ECHR is only applied if the parties have referred to it (which they usually do). However, if a party has not expressly referred to the ECHR, but it is clear that an ECHR provision or an ECtHR precedent applies, the administrative courts may apply the ECHR of their own accord. In addition, the courts must apply the ECHR *ex officio* if ECtHR case law pertains to provisions that are of so-called 'public order' (*openbare orde*), which means that they relate to core provisions of administrative law. This is mainly relevant for provisions determining the courts' competence to deal with a certain matter and provisions determining access to court, such as time limits and periods for appeal.

[67] General Guidelines for Legislation (*Aanwijzingen voor de regelgeving*)—digital version at https://www.kcwj.nl/kennisbank/aanwijzingen-voor-de-regelgeving. See, e.g., Guideline 18 on the general need for compliance with higher norms; Guideline 139 on the choice for a punitive sanction mechanism; Guideline 166 on retroactive effect of legislation.

[68] See in particular the checklist 'Review compliance (international) (classic) fundamental rights' (*Checklist toetsing (internationale) (klassieke) grondrechten*), which is part of the 'Integral consideration mechanism policy and legislation' (*Integraal afwegingskader beleid en regelgeving*) at [6.2.1.] (https://www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/62/621).

[69] If only for that reason the ECHR is often invoked before Dutch courts, even to such an extent that it has been said that, for the Netherlands, the ECHR has come to serve as a substitute constitution; see Claes and Gerards (n. 7), pp. 628–33.

7.45 The Dutch courts usually strive to ensure that all legislation and administrative decisions are interpreted in harmony with the ECHR and the judgments of the ECtHR (cf. MN. 7.06). They generally do not distinguish between judgments against the Netherlands and judgments rendered against other states but generally accept that all of the ECtHR's precedents have interpretative force.[70] As soon as a judgment is invoked by one of the parties and appears to be relevant for the Dutch situation, for example because it concerns a legal constellation similar to one existing in Dutch law, it is taken into account.

7.46 As a consequence the Dutch courts frequently use the standards that have been developed by the ECtHR.[71] For example, it is very common for the Dutch administrative courts to directly apply the standards the ECtHR has developed in cases about environmental hazards, expulsion of aliens, or administrative law penalties.[72] However, in quite a number of cases, the standards are slightly adjusted so as to provide for a better fit with traditional Dutch law concepts and norms. An example is the case law on special social assistance benefits (*bijzondere bijstand*) for illegal immigrants. In its first judgment on the issue the competent high administrative court, the CRvB, expressly referred to standards and criteria developed in the ECtHR's judgments. In doing so, however, it adapted them a bit so as to construe a set of specialized criteria to meet the demands of the particular situation type.[73] In subsequent judgments both the CRvB and the lower administrative courts have tended to refer only to this domestic precedent rather than to the underlying ECtHR judgment. Thus, Dutch courts use the ECtHR's case law mainly to supplement, build, and refine their own sets of standards rather than applying the standards exactly as they have been formulated by the ECtHR.[74]

7.47 In relation to the general principles of administrative law it is even more difficult to measure the impact of the ECtHR's case law. When applying these principles the starting point for Dutch courts is usually the carefully drafted provisions of the Awb. As already explained (cf. MN. 7.19 et seq.) these are often codifications of long-standing and well-established case law and doctrine combined with ECHR and EU influences as well as inspiration derived from foreign legal systems.

7.48 This practice also may have the effect that the standards or principles as applied in administrative law cases have a slightly different character and content as compared to the original ECHR standards. From an ECHR perspective this is not necessarily problematic since the ECtHR often leaves a certain margin of appreciation which offers sufficient flexibility to allow for such national typicalities.[75] Only if the adapted standards clearly fall below the ECHR minimum may there be a risk that, eventually, an application will be successfully lodged at the ECtHR. Thus far, however, in the area of administrative law, such applications have been mainly made in relation to migration law issues and have been rarely successful.[76]

[70] See Gerards and Fleuren (n. 7), pp. 217–60.

[71] See Claes and Gerards (n. 7), pp. 640–42.

[72] See generally, with many examples and references: Gerards and Sieburgh (n. 7).

[73] e.g., CRvB 22 December 2008, ECLI:NL:CRVB:2008:BG8776 and CRvB 4 August 2011, ECLI:NL:CRVB:2011:BR5381.

[74] See Gerards (n. 35), pp. 33–36.

[75] In more detail, see J. H. Gerards, 'Samenloop van nationale en Europese grondrechtenbepalingen—hoe moet de rechter daarmee omgaan?', (2010) 3 *Tijdschrift voor Constitutioneel Recht*, pp. 224–55.

[76] For more information see the yearly reports the government sends to the parliament to inform it about international human rights procedures (*Kamerstukken* 32735). The 2016 report shows that of the cases currently communicated to the government only 1 per cent relate to administrative law other than migration law, while 38

V. Reception of the Pan-European General Principles of Good Administration through Application of Other CoE Instruments

7.49 Non-binding decisions of international organizations, such as recommendations, obviously do not entail legal obligations for the Netherlands.[77] However, this does not imply that legislators, policy-makers, and courts turn a blind eye to recommendations, decisions, and other instruments of soft law by international organizations such as the CoE. Although the courts are not obliged to comply with them, they may refer to such instruments when interpreting and applying binding rules of international law. Similarly, just like the binding CoE Conventions, these non-binding instruments may be taken into account in legislative and administrative processes of rule- and decision-making. As already mentioned, however, the practice of doing so is uneven and, generally, it is much more common for judgments and legislative materials to refer to the ECHR (cf. MN. 7.36 et seq.).

7.50 These examples do not intend to give an exhaustive overview of the reception of pan-European general principles of good administration through legislation or case law. References to CoE documents can frequently be found in parliamentary papers. For example, the CM Recommendation No. R (91) 1 on administrative sanctions (cf. MN. 1.65) was referred to in the legislative history of the Awb and has also been mentioned in case law.[78] This (non-binding) recommendation contains a set of principles that public authorities should comply with when imposing punitive administrative sanctions. Interestingly, however, in this case the reference to the soft law instrument was combined with a reference to the case law of the ECHR, which has stronger legal force. The government emphasized that the principles listed in this recommendation were mostly based on Article 6 CHR and corresponding case law; it also mentioned that these principles were already observed in the national legal order and were merely made more concrete in the legislative proposal.[79]

7.51 Another CoE instrument that has been referred to in the context of the Awb is the European Charter for Regional or Minority Languages (cf. MN. 1.56). When the Awb was amended to incorporate rules on the use of language in communication with administrative bodies, including a provision on the use of the Frisian next to the Dutch language, the explanatory memorandum explained that the main provisions in this treaty, which at that time (1993) was signed but not ratified by the Netherlands, were far more abstract than the detailed provisions in the legislative proposal, thereby avoiding any overlap between the legal documents but instead reinforcing their meaning.[80] Interestingly, the provisions on the use of the Frisian language were removed from the Awb in 2011 and have been laid down in a separate Act on the use of the Frisian language with the argument that the use of this language should be guaranteed not only in administrative communication but also in judicial

per cent of the pending cases concern migration law (*Rapportage 2016 Internationale Mensenrechtenprocedures*, *Kamerstukken I* 2016/17, 32735, No. 170 (Annex) 66). In 2016 the ECtHR found one violation of the Convention in an administrative law case, *Gillissen v. the Netherlands*, since the equality of arms principle had been insufficiently respected in a procedure on social security measures (*Gillissen v. the Netherlands* [39966/09] 15 March 2016).

[77] e.g., ABRvS 22 June 2011, ECLI:NL:RVS:2011:BQ8830 at [2.4.1.].
[78] RBAMS 28 January 2000, ECLI:NL:RBAMS:2000:AA5739.
[79] *Kamerstukken II* 2003/04, 29702, No. 3, p. 124.
[80] *Kamerstukken II* 1993/94, 23543, No. 3, p. 9.

communication.[81] Thus, this example raises the more general question of to what extent CoE documents address an issue of general administrative law or a more general (constitutional) issue. Indeed, this is the type of question that the presentation of the four case studies hereafter aims to highlight.

1. The European Charter of Local Self-Government

7.52 One CoE instrument that has proven to be of some relevance for the Netherlands is the European Charter of Local Self-Government[82] (cf. MN. 1.58). In 2005 a study found that the Charter was little known in the Netherlands and, consequently, it did not have much impact.[83] Nevertheless, it is clear that the document plays a modest role in legislative and scholarly debates regarding the role and institutional position of municipalities.[84]

7.53 To understand the Charter's (lack of) impact it is useful to know that the Netherlands is a decentralized unitary state where the role of local governments is determined by two sets of competences.[85] First, municipalities cooperate with the central government in implementing legislation and centrally determined policies ('*medebewind*'—delegated government or co-governance). Second, in fields not regulated by the central government municipalities can autonomously take their own decisions and shape their own policies ('*autonomie*'). Even in these autonomous fields, however, the central government is empowered to monitor and supervise the municipalities. It can withhold its approval of by-laws or reverse municipal decisions because of an incompatibility with higher law or because of policy reasons relating to expediency (*doelmatigheidsoverwegingen*). Over the past decades the number of fields regulated by means of co-government have gradually increased at the expense of autonomous regulation. Even though municipalities often enjoy discretion in these fields autonomy for local governments is currently rather limited,[86] which has given rise to considerable scholarly and political debate.[87]

7.54 Given its emphasis on local autonomy it could be expected that the European Charter of Local Self-Government plays a role in the Dutch debate on decentralized government and autonomy of municipalities. Indeed, the Charter is sometimes referred to in relation to legislative proposals having an impact on local self-government. An example can be found in legislation on the supervision of decentralized government, which was introduced in 2012: literally, the Act on Revitalization of Generic Supervision (*Wet revitalisering generiek toezicht*).[88] The aim of this legislation was to simplify and streamline the complex system of

[81] *Kamerstukken II* 2011/12, 33335, No. 3, pp. 3 and 6.

[82] *Trb* 1987, 63. The Charter entered into force for the Netherlands in 1991 (*Trb* 1991, 61).

[83] C.B.M. van Haaren-Dresens, 'Het Handvest lokale autonomie en gemeenten: maakt onbekend onbemind?', (2005) *Gemeentestem*, pp. 9–15.

[84] See in particular the examples given in: J.L.W. Broeksteeg et al, *Constitutionele normen en decentralisatie. Een evaluatie van Hoofdstuk 7 Grondwet*, *Kamerstukken II* 2009/10, 31570, No. 16 (Appendix) 55.

[85] See further Congress of Local and Regional Authorities (CLRAE), *Local and regional democracy in the Netherlands* (CG(26)7final) of 26 March2014 CG(26)7FINAL; for a general basis in English, see, e.g., P.P.T. Bovend'Eert and C.A.J.M. Kortmann, *Constitutional Law in the Netherlands* (2nd ed. 2012), pp. 53 et seq. This is further regulated in Chapter 7 of the *Grondwet* as well as in the *Gemeentewet*.

[86] See critically on this, e.g., CLRAE (n. 85) at [5c.].

[87] For recent scholarly contributions to this debate, see, e.g., S.A.J. Munneke, 'Medebewind', (2016) 61 *Gemeentestem*, p. 327; D.J. Elzinga, 'Naar een nieuwe vorm van zelfbestuur', (2016) 100 *Gemeentestem*, p. 541.

[88] *Stb* 2012, 276.

supervision in relation to co-government (*medebewind*). In the explanatory memorandum the government mentioned that the 'proposed system of intergovernmental supervision was tested against and made compatible with Article 8 of the Charter, which contains guarantees concerning intergovernmental supervision on local self-government'.[89] Thus, the Charter seemed to function as a relevant legal standard for the proposed legislation even if it is not clear what the government's 'test' entailed and which incompatibilities were removed because of its results.[90]

7.55 It must be emphasized, however, that such specific attention is paid to the Charter only rarely. It is much more common that the document is not mentioned at all in explanatory memoranda or in parliamentary debates, even where such attention could be expected. For example, in the parliamentary papers accompanying legislation on the observance of European law by public entities (of which municipalities form part) the Charter is not referred to in any way, even though the legislation entailed important competences for the central government to supervise and intervene in local decisions concerning European law.[91] Similarly, not a single reference to the Charter can be found in the legislation introducing important revisions of the governance structure of municipalities (*Wet dualisering gemeentebestuur* and *Wet dualisering gemeentelijke medebewindsbevoegdheden*).[92]

7.56 In yet other legislative discussions the Charter is mentioned but does not play any significant role. For example, in relation to a bill on sustainable public finance (*Wet houdbare overheidsfinanciën*) some members of parliament were curious to know how its proposals related to the principle that decentralized government ought to be autonomous. More specifically, they asked the government 'whether there was not a European Charter that pointed to the importance of decentralization, self-governance, et cetera?'. The government replied that such a Charter indeed existed and that it emphasized the importance of local autonomy but the government also mentioned that the Charter allowed the legislature to limit the autonomy of local governments. Implicitly, thus, the government suggested that it could make use of this possibility in the current legislation. This seems to have ended the debate since no further references to the Charter can be seen in the parliamentary debates on the bill.

7.57 The discernible impact of the European Charter of Local Self-Government is equally limited where case law is concerned. On a few occasions local authorities have started a procedure against the central government when they felt that new legislation or decisions encroached on their autonomy. In 2011 the municipality of The Hague went to court when the Minister for Infrastructure reversed a permit the municipality had granted to a company to build an offshore windmill park.[93] According to the municipality the minister's reversal was incompatible with Articles 2, 4, and 11 of the European Charter of Local Self-Government. In its judgment the ABRvS held that Articles 2 and 4 of the Charter could not be regarded

[89] *Kamerstukken II* 2009/10, 32389, No. 3, p. 9.

[90] See also R.J.M.H. de Greef and C.B.M. van Haaren-Dresens, 'Spontane vernietiging wegens strijd met algemeen belang', (2011) 116 *Gemeentestem*, pp. 114–22.

[91] *Wet Naleving Europese regelgeving publieke entiteiten (Wet NERPE), Stb.* 2012, 245 (*Kamerstuknr.* 32157). For more attention to the Charter, see J. H. Gerards, 'De naleving van het Europese recht door de decentrale overheden: naar een herzien stelsel van toezicht', (2000) *SEW, Tijdschrift voor Europees en economisch recht*, pp. 208–15.

[92] Respectively *Stb* 2002, 112 (*Kamerstuknr.* 27751) and *Stb* 2012, 531 (*Kamerstuknr*. 16538).

[93] ABRvS 7 December 2011, ECLI:NL:RVS:2011:BU7093. See also ABRvS 29 July 2011, ECLI:NL:RVS:2011:BR4025.

as self-executing provisions of international law because they were not sufficiently precisely drafted. As for Article 11, it noted that the Kingdom of the Netherlands was not bound to respect this provision as a result of a declaration made at the time of ratification. For that reason the ABRvS rejected the appeal. This judgment shows that enforcing the Charter by means of judicial proceedings is not easy. Nevertheless, it also makes it clear that there still might be a possibility of giving legal effect to the Charter. After all, the judgment concerned only three specific provisions and the ABRvS did not exclude the possibility that it might find differently for other Charter provisions.

7.58 Particularly interesting in this regard is a procedure started by the municipality of Voorst on the Participation Act (*Participatiewet*), which had the aim of decentralizing competences regarding the distribution of social benefits.[94] To enable the municipalities to exercise the tasks entrusted to them under the new legislation an earmarked budgetary allowance was allocated to each of them. In 2014 the Secretary of State for Home Affairs sought to recover about one-fifth of the budget allocated to Voorst because an audit had shown its failure to fully realize the objectives set in the legislation. The municipality claimed that it had submitted incomplete information to the auditors by accident and it asked the Secretary of State to revise the recovery decision based on the complete and correct information. The Secretary of State refused to do so, however, because of the importance of correct and timely delivery of information for the audit. According to the municipality the Secretary of State's refusal ran contrary to Article 8 (3) of the European Charter of Local Self-Government since the recovery decision was not proportionate to the objectives of the system for accountability. In its judgment in appeal the CRvB considered that it did not need to answer the question as to the direct effect of this provision because the recovery of the allowance was not incompatible with the Charter anyway. Even if the recovery mechanism could be regarded as strict it was sufficiently justified by the great importance of the legislature's desire to prompt timely and correct delivery of accountability information. Again, this judgment shows that it is not excluded that certain provisions of the Charter are given direct effect and can be invoked directly before the Dutch courts. It also makes it clear, however, that an appeal to the Charter will not be easily accepted.

2. The CoE Convention on Access to Official Documents

7.59 Although the law on access to official documents is considered to be part of *general* administrative law, the general rules on access to official documents have never been integrated into the Awb. Instead these rules are laid down in a separate Freedom of Information Act (*Wet openbaarheid van bestuur—Wob*). Although the drafters of the Awb have repeatedly proposed combining these two pieces of legislation, practical objections and, at an underlying level, political sensitivity have impeded this integration until now. In the 1980s, when the first package of the Awb was drafted, integration of the rules on freedom of information into the Awb was considered inconvenient, since a new legislative proposal for the adoption of a new Wob had just been launched.[95] A more recent proposal to integrate the Wob into

[94] CRvB 9 February 2017, ECLI:NL:CRVB:2017:487.
[95] *Kamerstukken II* 1986/87, 19 859, No. 3, p. 4; *Kamerstukken II* 1988/89, 21 221, No. 3, p. 13.

the Awb was not followed by the government, because it did not want to delay the enactment of a new package of the Awb by adopting a new position on the Wob.[96]

7.60 For many decades the right of access to official documents has developed rather autonomously in the Netherlands, i.e., independently of the 'law' of the CoE. In 1965 the *Hoge Raad* held that Article 10 ECHR does not imply an obligation for a person to provide the information he holds to third parties, irrespective of whether this person is a public body or another legal or natural person.[97] Thus, a right of access to State-held information could not be derived from Article 10 ECHR. Consequently, the first Wob that was proposed[98] and adopted[99] in the 1970s did not have its roots in Article 10 ECHR, but in national initiatives, which in the aftermath of World War II aimed to promote governmental information whilst at the same time excluding governmental propaganda.[100] The resulting Wob of 1978 was replaced in 1991 by the current Wob, which is still in force.[101] One important characteristic of the Wob is that an applicant does not need to state his interest when requesting governmental information (Article 3 (3) Wob). Thus, it is irrelevant whether a scholar, a journalist or a citizen requests information. The immediate consequence of this rule is that access to information for one person implies access to this information for everyone. For the purposes of assessing the impact of CoE law on national legislation it is worth mentioning that neither the legislative history of the Wob of 1978 or the current Wob contains references to the ECHR or other documents of the CoE.

7.61 With the CoE Convention on Access to Official Documents (cf. MN. 1.59), together with recent case law on Article 10 ECHR (cf. MN. 1.48 et seq.), this 'autonomous' development of the right of access to governmental information seemed to belong to the past. The Dutch government was closely involved in the negotiations on the CoE Convention on Access to Official Documents, both because it perceived access to government information to be of great importance and because of the expected impact of this treaty on national legislation.[102] The objective of the Dutch government in the negotiations was to achieve a level of protection similar to the Wob.[103] The government claimed success in this effort: the consequences of the convention for national legislation would only be marginal, since both the institutional scope (applying to public *and* (certain) semi-public bodies) and the refusal grounds of the convention were almost identical to the existing legal rules in national legislation.

7.62 Nonetheless, the government acknowledged one important difference between the CoE Convention on Access to Official Documents and the Wob: whereas Article 7 of CoE Convention stipulates that a fee charged to the applicant for a copy of the official document should be reasonable and not exceed the actual costs of reproduction and delivery of

[96] *Kamerstukken II* 2003/04, 29 702, No. 3, p. 6.
[97] HR 25 July 1965, ECLI:NL:PHR:1965:AC4587, NJ 1966, 115 (*Televizier*). The issue was brought before the European Commission of Human Rights (application No. 2690/65) but since the case was finally settled between the parties the commission did not give its decision on this issue.
[98] *Kamerstukken II* 1974/75, 13 418, No. 1–4.
[99] Wet openbaarheid van bestuur, *Stb.* 1978, 581.
[100] *Kamerstukken II* 1974/75, 13 418, No. 1–4, p. 1.
[101] Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur, *Stb.* 1991, 703, as amended afterwards.
[102] Aanhangsel Handelingen II 2009/10, No. 1305.
[103] *Kamerstukken II* 2010/11, 32 802, No. 1, p. 3.

the document, the Wob does not exclude in advance the fee imposed exceeding the actual reproduction costs (e.g. the costs of searching and gathering information). This made the government hesitate about whether, in the end, it would be wise to sign the treaty.

7.63 Eventually the government decided *not* to sign this treaty. Although it originally intended to make the Wob more compatible with the treaty as far as the fees were concerned,[104] it did not manage to submit a legislative proposal to achieve more compliance. Moreover, signing the treaty would require scrutinizing all existing publicity regimes in national legislation as to their compliance with the treaty. According to the government such an effort would unnecessarily burden the administrative authorities. Since a quick scan had further shown that the consequences of this treaty would only be marginal, the government found no priority in signing the agreement. The government saw confirmation of this lack of urgency in the developments in other countries, which did not make much progress in signing this treaty either. According to the government not signing the CoE Convention on Access to Official Documents would not mean that this convention would be completely irrelevant: it promised not to initiate any proposal that would contravene the provisions of the treaty.[105]

7.64 Although the Dutch government has still not taken a final decision on signing the treaty, there is a legislative proposal for an Open Government Act (*Wet open overheid—Woo*) that has been adopted by the House of Representatives and is currently pending before the Senate.[106] According to the Members of Parliament who took the initiative on this legislative proposal the Woo not only builds explicitly on certain elements of the CoE Convention, such as the extension of the freedom of information regime to semi-public bodies and the obligation to register all official documents, but also mainly complies with the provisions of this treaty.[107] However, it is acknowledged that at some points the Woo does not fully coincide with the treaty, e.g. the existence of some additional refusal grounds in national legislation. The promoters of the Woo admit that, should the treaty be signed and ratified in the future, it might be necessary to amend this act.[108] Nonetheless, the CoE Convention on Access to Official Documents appears to be an important, although not exclusive, 'point of reference' for the drafting of this legislative proposal.[109]

7.65 Since the CoE Convention on Access to Official Documents has not entered into force for the Netherlands, it has scarcely been invoked before the administrative courts. Not surprisingly, the few cases that refer to the CoE Convention deal with the level of the fees calculated for access to official documents. The administrative courts are univocal in rejecting an appeal to this treaty: as this treaty had not been ratified and is therefore not binding, it does not prevent administrative authorities from integrating search and anonymization costs

[104] *Kamerstukken II* 2010/11, 32 802, No. 1, p. 13.
[105] *Kamerstukken II* 2010/11, 32 802, No. 1, p. 3–4. See also E.J. Daalder, 'In afwachting van een regeringsstandpunt over Tromsø', (2011) 5 *Nederlands Juristenblad*, pp. 10–11.
[106] *Kamerstukken II* 2015/16, 33 328, see on this proposal Klingenberg (n. 60), pp. 20–24.
[107] *Kamerstukken II* 2013/14, 33 328, No. 9, pp. 4–5.
[108] *Kamerstukken II* 2013/14, 33 328, No. 12, pp. 11–12.
[109] See in particular *Kamerstukken II* 2013/14, 33 328, No. 12, pp. 11–12, where the promoters of the Open Government Act respond to questions on the compatibility of the proposed act with the CoE Convention on Access to Official Documents.

in the fees.[110] To the extent that courts have held that some costs could not be charged to the budget of the applicant, such judgment was not based on norms derived from the CoE Convention on Access to Official Documents but on national norms.[111] Thus, the impact of the CoE Convention in case law is negligible.

7.66 Unlike most other cases one case before the ABRvS did not deal with the level of the fees but with the institutional scope of the Wob. An applicant was confronted with a refusal by the Association of Dutch Municipalities (*Vereniging van Nederlandse Gemeenten—VNG*) to make certain documents available. The applicant invoked both the CoE Convention on Access to Official Documents and Article 10 ECHR to support his claim that this association was obliged to give access to certain documents. The appeal to the treaty was rejected simply because the Netherlands was not a party to this treaty. With regard to Article 10 ECHR the ABRvS considered that this right does not imply the right to receive information from a legal person that is not classified as an administrative body, thereby calling to mind the earlier mentioned *Televizier* judgment as far as non-governmental legal persons are involved.[112]

7.67 This relationship between the Wob and Article 10 ECHR turns out to be far more important in national case law than the relationship between the Wob 1991 and the CoE Convention on Access to Official Documents. In 2011 the ABRvS already seemed to be assuming that Article 10 ECHR might entail a right to receive State-held information, but considered that the refusal ground of personal policy ideas in Article 11 Wob was a restriction prescribed by law and necessary in a democratic society to protect the rights of others.[113] After the ECtHR in *Magyar Helsinki Bizottság*[114] had acknowledged the right of access to State-held information as a corollary of Article 10 ECHR in 2016 (MN. 1.48 et seq.), the ABRvS built on this by denying access to additional State-held information to an applicant who did not have the capacity of a public watchdog, thereby suggesting that public watchdogs can derive more far-reaching rights from the freedom of information regime.[115] Finally, in a very recent judgment, the ABRvS ruled on the compatibility of the Wob with Article 10 ECHR. It held that while, in general, the refusal grounds in the Wob could be assumed to be necessary in a democratic society for the protection of the interests mentioned in Article 10 ECHR it could not be excluded in advance that an applicant might indicate that these refusal grounds are not in compliance with Article 10 ECHR in a particular case. In these very particular circumstances refusal of access to State-held information could constitute a breach of Article 10 ECHR, depending on the nature of the information sought and the role of the applicant.[116]

[110] GHSGR 6 July 2011, ECLI:NL:GHSGR:2011:BR0373 at [7.5.3], as confirmed by HR 8 February 2013, ECLI:NL:HR:2013:BX0945.
[111] ABRvS 22 August 2012, ECLI:NL:RVS:2012:BX5240.
[112] ABRvS 25 May 2011, ECLI:NL:RVS:2011:BQ5933.
[113] ABRvS 19 January 2011, ECLI:NL:RVS:2011:BP1315, AB 2011/148 (case note E.J. Daalder).
[114] *Magyar Helsinki Bizottság* case (n. 59); case note T. Barkhuysen and M.L. van Emmerik in AB 2017/1.
[115] ABRvS 22 February 2017, ECLI:NL:RVS:2017:498, AB 2017/147 (case note J. Tingen).
[116] ABRvS 25 October 2017, ECLI:NL:RVS:2017:2883.

3. The CoE Convention for the Protection of Individuals with regard to Automatic Data Processing

7.68 The chronological development of legislation on the protection of personal data is somewhat similar to that of the legislation on access to official documents, i.e., starting in the 1970s. In 1972, just before the adoption of two recommendations by the CM on the protection of personal data in 1973 and 1974,[117] the State Commission on the protection of private life in respect of personal registration (*Staatscommissie bescherming persoonlijke levenssfeer in verband met persoonsregistraties*) was installed. The decision to install this commission was an immediate response to the resistance against the population census of 1971.[118]

7.69 The *Staatscommissie* presented a first draft for general privacy legislation in 1976[119] that was roughly followed by the government in November 1981 when it submitted a legislative proposal on the protection of personal data.[120] In the explanatory memorandum the government made it clear that it aimed to build on the two recommendations of 1973 and 1974 as well as on the CoE Convention for the Protection of Individuals with regard to Automatic Data Processing (cf. MN. 1.60) that had been concluded in January 1981.[121] However, it was not until 1988 that a strong revision of the initial legislative proposal[122] was ultimately adopted and the Act on personal registrations (*Wet persoonsregistraties—Wpr*) entered into force.[123]

7.70 This Wpr was replaced by the Act on the protection of personal data (*Wet bescherming persoonsgegevens—Wbp*) in 2001, which implemented Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Very recently, as a response to the EU's General Data Protection Regulation[124] introducing a new data protection regime as from May 2018 in the EU, a legislative proposal to implement this regulation in the Dutch legal order has been adopted.[125]

7.71 The legislative history of the Wpr, the first general act on personal data protection, shows a strong orientation towards the Convention No. 108, as shown by multiple references to this treaty in support of the applicable national rules. However, it was only after the entry into force of this national legislation that the Netherlands could sign and ratify the Convention No. 108 in 1988 and 1993, respectively,[126] since accordance of national legislation with the treaty was a condition for signing the treaty.

[117] CM Resolution (73)22 of 26 September 1973 on the Protection of the privacy of individuals vis-à-vis electronic data banks in the private sector, and CM Resolution (74) 29 of 20 September 1974 on the Protection of the privacy of individuals vis-à-vis electronic data banks in the public sector.

[118] In greater depth, see M. Overkleeft-Verburg, *De Wet persoonsregistraties. norm, toepassing en evaluatie* (1995).

[119] Staatscommissie Koopmans, *Privacy en persoonsregistraties* (1976).

[120] *Kamerstukken II* 1981/82, 17207, No. 2 (Wet op de persoonsregistraties).

[121] *Kamerstukken II* 1981/82, 17207, No. 3, p. 6.

[122] *Kamerstukken II* 1984/95, 19095, No. 1–3.

[123] Wet persoonsregistraties, Stb. 1988, 665.

[124] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

[125] Implementing Act General Data Protection Regulation of 16 May 2018 (*Uitvoeringswet Algemene Verordening Gegevensbescherming*).

[126] *Trb.* 1988, 7 and *Trb.* 1993, 116 respectively.

7.72 In its explanatory memorandum to the subsequent Wbp the government explained that the Convention No. 108 had not ensured free movement of data within the EU, thereby showing the need for additional EU legislation.[127] Hence, with the adoption of the Directive 95/46/EC and the national implementation thereof, this directive has become the main point of reference for the interpretation and application of national legislation on privacy protection, even though the government emphasized that the Convention No. 108 would remain relevant for areas not covered by the Directive 95/46/EC.[128] Indirectly, the treaty may still be relevant with regard to free movement of data since the Directive 95/46/EC aimed to respect the principles laid down in the treaty (cf. MN. 1.60).

7.73 What is more the Wbp also explicitly aims to respect Article 8 ECHR.[129] Case law shows that the ECtHR is willing to interpret this provision with explicit reference to the Convention No. 108 in issues of data processing.[130]

7.74 In sum, the Convention No. 108 has lost its (limited) direct relevance for national legislation of EU Member States, since the Directive 95/46/EC became the primary orientation point in issues of data processing. Today the Implementation Act of the General Data Protection Regulation is the new orientation point, again articulating the dominance of EU legislation. Nonetheless, the explanatory memorandum accompanying the proposal for the Implementation Act mentions that the new Regulation is a step, but not the final step, in the protection of personal data. In that regard the government refers to the current negotiations on the Convention No. 108 to remove incompatibilities between this treaty and EU legislation.[131] Possibly, therefore, in the future the Treaty may regain its importance for Dutch administrative law. What remains is a limited indirect relevance, mainly via the application of Article 8 ECHR.

7.75 The same conclusion holds for the case law of administrative courts: the Convention No. 108 does not play an important role in the case law of the administrative courts, at least not directly. As far as the treaty is mentioned in (recent) case law, it is mainly[132] as part of a reference in a recital of the Directive 95/46/EC or an explanatory statement to Article 8 CFR.[133] However, even before the adoption of the Directive 95/46/EC the Convention No. 108 did not seem to play an important role in national case law. This might be due to the limited period when the it was in force in the Netherlands before the adoption of the Directive 95/46/EC (1993–95).

[127] *Kamerstukken II* 1997/1998, 25 892, No. 3, p. 4.
[128] *Kamerstukken II* 1997/1998, 25 892, No. 3, p. 14.
[129] *Kamerstukken II* 1997/1998, 25 892, No. 3, p. 8.
[130] See, e.g., *Z v. Finland* (22009/93) 25 February 1997 ECtHR; *Amann v. Switzerland* (27798/95) 16 February 2000 ECtHR [GC]; *Rotaru v. Romania* (28341/95) 4 May 2000 ECtHR [GC].
[131] *Kamerstukken II* 2017/18, 34851, No. 3, pp. 8–9.
[132] For scarce exceptions, see Rb Midden-Nederland 9 August 2013, ECLI:NL:RBMNE:2013:3268 (broad interpretation of personal data under Article 8 ECHR because of CoE Convention on Protection of Individuals with regard to Automatic Data Processing).
[133] See, e.g., ABRvS 2 November 2011, ECLI:NL:RVS:2011:BU3136 (EU Charter) and GHSHE 13 June 2014, ECLI:NL:GHSHE:2014:1762 (Privacy Directive).

4. Decisions of the ECSR and the 'Bed, Bath, and Bread' Issue

7.76 The final case study to be discussed in this section does not so much concern a particular CoE Convention as the impact of non-binding decisions of the ECSR on Dutch administrative law in the particular field of migration and social security law. This case study is presented as a narrative to demonstrate how various European and national instruments may interact in influencing both national case law and national policy in the Netherlands.

7.77 The issue to be discussed here is known in the Netherlands as the 'bed, bath, bread issue' (*bed, bad, brood-discussie*).[134] It specifically concerns the question of to what extent and how the minimum rights to food, clothing, and shelter can be enjoyed under the European Social Charter (ESC) (cf. MN. 1.56) by migrants whose applications for international protection or for a residence permit have been rejected and who are no longer lawfully resident in the Netherlands.

7.78 The Aliens Act 2000 (*Vreemdelingenwet 2000*) provides that if an alien is no longer lawfully resident he should leave the Netherlands of his own volition and the benefits in kind provided to him (such as food or shelter) are terminated. In addition, the Social Support Act (*Wet Maatschappelijke Ondersteuning*) specifies that aliens who are not lawfully resident in the Netherlands are not eligible for municipal shelter services or for other forms of social support. According to a number of non-governmental organizations the resulting lack of access to basic shelter and minimum subsistence for 'irregular aliens' is irreconcilable with the ESC. They asked the ECSR to examine the Dutch legislation and policy and indeed, in 2014, the ECSR found that it constituted a violation of Articles 13 (4) and 31 (2) ESC.[135] A heated debate ensued on the consequences of this decision.[136] The government took the position that it did not have to give any immediate effect to the decision and it postponed any further decision-making until the CM had had an opportunity to review the ECSR's decision and to present its views on the necessary follow-up.[137]

[134] On this debate, see, e.g., Y. Donders, 'Europa's voorvechter van economische en sociale rechten—Het Europees Comité voor Sociale Rechten', (2014) 4 *Ars Aequi*, pp. 253–61; T. Barkhuysen, 'Bed, bad en brood voor uitgeprocedeerde asielzoekers', (2014) 2055 *Nederlands Juristenblad*, p. 2841; Th. van Boven, F. Coomans, C. Flinterman, and M. Kamminga, 'Bed, bad en brood: een mensenrecht', (2015) 1093 *Nederlands Juristenblad*, pp. 1535–536; D. Mohammadi, 'Opvang van uitgeprocedeerde vreemdelingen: waarom we het voorbeeld van de gemeenten moeten opvolgen', (2015) 10 *Ars Aequi*, pp. 749–61; Gerards (n. 2), pp. 11–85; K. Zwaan and P. Minderhoud, 'Bed-bad-brood: Vrijheidsbeperking niet in strijd met verplichting om opvang te bieden?', (2016) 165 *Gemeentestem*, pp. 891–98; A. Terlouw, 'Commentaar bij de bed-bad-brood-uitspraken van RvS en CRvB: Een sluitend systeem van opvang?', (2016) 1 *Asiel&Migrantenrecht*, pp. 4–9.

[135] *European Federation of National Organisations Working with the Homeless (FEANTSA) v. Netherland*s (86/2012) 1 July 2014 ECSR; *Conference of European Churches (CEC) v. Netherlands* (90/2013) 1 July 2014 ECSR. Earlier, the ECSR had already imposed an obligation on the Netherlands to guarantee that no one would be compelled to live under inhumane conditions; see *Conference of European Churches (CEC) v. Netherlands* (90/2013) 25 October 2013 ECSR [immediate measures]. See in greater depth on this, e.g., Donders (n. 134), pp. 253–61 and Mohammadi (n. 134), pp. 749–61.

[136] See Gerards (n. 2), pp. 11–85.

[137] On the procedure, see Article 9 of the Additional Protocol to the ESC; see also R. Churchill and U. Khaliq, 'The Collective Complaints System of the European Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', (2004) *EJIL*, pp. 417–56 (pp. 438 et seq.). On the government's position, see, e.g., the answers to parliamentary questions raised by MPs Pechtold, Van Haersma Buma, Slob, Van Ojik, Van der Staaij, and Roemer, 30 April 2015, *Aanhangsel Handelingen TK* 2014/15, 2134; letter to the Parliament by the Secretaries of State for Security and Justice and for Public Health, Welfare and Sports of 11 November 2014, *Kamerstukken II* 2014/15, 19637, 1915; letter to the Parliament by the Secretary of State for Security and Justice of 18 December 2014, *Kamerstukken II* 2014/15, 1940.

7.79 In the meantime a number of (mainly lower) courts were asked to decide on concrete refusals to provide shelter or food to irregular aliens.[138] In their judgments the courts frequently referred to the ECSR's decision but in doing so they used different legal techniques with diverging legal outcomes. Some lower courts used the decision as support for their interpretation of the relevant ESC provisions or of the relevant legislation, or they referred to it to support a certain interpretation of the ECHR.[139] By contrast other courts refused to give legal effect to the decision by the ECSR because of its lack of legally binding effect or because the CM itself had not yet pronounced on the matter.[140]

7.80 In April 2015 the CM handed down its resolution, which offered rather less clarity about the exact obligations of the Netherlands than many had hoped for.[141] The government read the resolution as supporting its own view that the ECSR had provided for an improper interpretation of the Charter and that its policy did not violate its international obligations.[142] All the same, in response to the decision and the resolution, the government presented a new policy which roughly entails that irregular aliens who are legally obliged to return to their countries of origin can find shelter in a 'liberty-restricting institution' until their return can be effected (*vrijheidsbeperkende locatie*).[143]

7.81 Eventually, the two high administrative courts competent to decide on these matters—the ABRvS and the CRvB—were asked to review the new policy for its compatibility with the ECHR and the ESC.[144] In their reasoning the two courts referred to the ECSR's decision in different ways.[145] The ABRvS chose to apply the relevant provisions of the ECHR, read in the light of the ECSR's decision, while the CRvB reviewed the national policy and legislation more directly for compatibility with the ECSR's views. Although the reasoning diverged the outcomes of the two cases were coordinated—both highest courts decided that the new policy was in line with the relevant international obligations. Now, for the ECHR, this finding has been confirmed by the ECtHR.[146]

7.82 These judgments have not ended the debate, however, as is shown by a series of procedures in which aliens—sometimes successfully—have contested the application of the new policy in their cases. In these more recent judgments the ECSR decisions have not played any meaningful role. Instead the ABRvS has emphasized that the new policy has been condoned

[138] For a review of the various decisions focused on the effect given to the decision by the ECSR, see Gerards (n. 2), pp. 56 et seq.

[139] Gerards (n. 2), pp. 56 et seq.

[140] Gerards (n. 2), p. 64.

[141] Resolution CM/ResChS (2015) 5 *Conference of European Churches (CEC) v. the Netherlands* (90/2013), 15 April 2015.

[142] Letter by the Secretaries of State for Security and Justice and the Ministers of Foreign Affairs and of Social Affairs and Employment, *Kamerstukken II* 2014/15, No. 1994, p. 1.

[143] Letter by the Secretaries of State for Security and Justice and the Ministers of Foreign Affairs and of Social Affairs and Employment (n. 142), pp. 2 et seq., complemented by the decision by the Secretary of State of 28 March 2017, WBR 2017/3; see *Stcrt* 2017, 17943. For a brief description of the new policy in English, see *Hunde v. the Netherlands* (17931/16) 5 July 2016 ECtHR [dec] at [28] et seq.

[144] ABRvS 26 November 2015, ECLI:NL:RVS:2015:3415 and CRvB 26 November 2015, ECLI:NL:CRVB:2015:3803. The ABRvS has confirmed this judgment in more recent cases; see, e.g., ABRvS 29 June 2016, ECLI:NL:RVS:2016:1782.

[145] In more detail, see Gerards (n. 2), pp. 65–66.

[146] See *Hunde* case (n. 143). Although a number of municipalities want to continue offering basic amenities to undocumented aliens the central government has indicated it shall no longer negotiate with them on the topic; see letter to the Parliament by the Secretary of State on the further understanding of the intergovernmental agreement on local facilities for aliens of 29 November 2016, *Kamerstukken II* 2016/17, 19637, No. 2264.

by the ECtHR and, for that reason, it cannot be held to be incompatible with the ECHR.[147] Moreover, it seems that the debate in the courts has shifted to the legal classification of the new policy, the applicable legal standards, and the individual circumstances of an alien which could possibly justify an exception.[148] Currently, therefore, the CoE documents seem to be of less relevance than at the beginning.

VI. Direct Application of the Pan-European General Principles of Good Administration '*faute de mieux*'

7.83 As the case studies have illustrated recommendations and other non-binding soft law of the CoE usually play a role in administrative case law merely as a source of inspiration or as confirmation of an interpretation of a binding norm such as a provision of the ECHR. Theoretically, however, they also might play a more independent legal role, for example where national legal provisions are lacking or where the administration has wide discretionary powers.

7.84 It goes too far to say that Dutch administrative law is familiar with such a '*faute de mieux*' approach, i.e., the direct application of CoE soft law for lack of a better alternative in terms of a legally binding provision (cf. MN. 2.58 et seq.). Indeed Dutch administrative courts hardly refer to soft law of the CoE in order to determine the content of a general principle applicable to Dutch law. One explanation may be that there are not many cases in which it is agreed upon that legally binding provisions are lacking; the general principles of administrative law as codified in statutory law provide for an extensive set of national norms with a general character and, in many cases, fall-back options can be found in the ECHR or in EU law, as the case studies have illustrated. This inclination to stay rather close to national legislative provisions, use the well-known general principles of administrative law, or rely on European treaty provisions as explained by the CJEU and the ECtHR is not only a tendency of the civil courts but of the administrative courts as well. In so far as these courts do refer to CM recommendations such reference is therefore made only to support a certain interpretation of a (binding) provision of the ECHR provision, especially in cases where there is no direct precedent of the ECtHR available in which that interpretation is supported or where an ECtHR judgment is relatively vague.

7.85 An example thereof is the so-called *Clickfonds* case where the *Hoge Raad* explicitly mentioned that its interpretation of Article 6 (2) ECHR concerning the presumption of innocence was based on the case law of the ECtHR as it was confirmed by CM Recommendation (2003)13 on the provision of information through the media in relation to criminal proceedings.[149] Another example is a case on the application of less repressive provisions in an administrative sanctioning procedure, where the administrative court referred to CM Recommendation No. R (91)1 on administrative sanctions to support its reading of Article

[147] e.g., ABRvS 5 July 2017, ECLI:NL:RVS:2017:1741 at [8].
[148] See, e.g., ABRvS 5 July 2017, ECLI:NL:RVS:2017:1826 and ECLI:NL:RVS:2017:1828.
[149] HR 13 July 2007, ECLI:NL:HR:2007:BA3161, NJ 2007/505 with comment by F. Vellinga-Schootstra. In this case law comment it was noted that the CM Recommendation (2003)13 should be a powerful impetus for the legislature to fill up the discovered lacunas.

7 ECHR.[150] Both examples show that courts only seem willing to rely on the soft law of the CoE if there is a sufficiently established link to a binding document, in this case the ECHR. Thus, in fact, in both criminal law and administrative law the national courts still do not really apply the soft law of the CoE but use it merely indirectly to give shape to a (binding) provision of the ECHR.

7.86 By contrast a very exceptional mode of application, '*faute de mieux*', can be distinguished in Dutch administrative law with regard to treaty provisions by which the Netherlands is not formally bound. With regard to non-ratified law of the CoE there is a unique case of the *Hoge Raad*, again with respect to administrative sanctions, where it referred to Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the ECHR, which has not been ratified by the Netherlands (cf. MN. 7.34). The *Hoge Raad* held that Article 4 of Protocol No. 7, although not ratified, expressed the internationally acknowledged *ne bis in idem* principle, which could be applied as a legally binding principle.[151] Although this case did not concern a general principle of administrative law it helps to illustrate that, in very rare cases, an application by way of analogy can be seen in which non-ratified international law (instead of soft law) is used by the courts as a seemingly free source of inspiration for finding a general principle of law. Such an application by way of analogy is not completely unfamiliar in Dutch administrative law: in the same vein administrative courts have been willing to apply provisions of the Civil Code (*Burgerlijk Wetboek*) that are not directly applicable in an administrative case, albeit freely and in a modified way.[152]

7.87 Where a direct '*faute de mieux*' application of soft law of the CoE by the courts is almost non-existent, it is worth mentioning that reference to the (soft) law of the CoE is sometimes made by Advocates-General in their opinions to the highest (civil, criminal, and administrative) courts (cf. MN. 7.12). An illustrative example thereof is a case of the *Hoge Raad* on the detention regime in the Netherlands. While the *Hoge Raad* did not refer to the soft law of the CoE, the Advocate-General associated with the *Hoge Raad* mentioned CM Recommendation Rec(2006)13 on the use of remanding in custody, the conditions in which it takes place and the provision of safeguards against abuse, when discussing Articles 5 and 6 (2 and 3) ECHR in relation to provisional custody.[153] Admittedly, the number of examples of cases where the Advocates-General refer to the soft law of the CoE is very limited, but this might change in the future because of the recent introduction of an Advocate-General across all four highest administrative courts (instead of the *Hoge Raad* only).

7.88 In sum, as far as references to soft law of the CoE are concerned, most references are made in the framework of applying the ECHR. In those cases for the national administrative courts this simply amounts to the reception of European soft law through the application of the ECHR. Thus, what we can reasonably state is that soft law of the CoE—sometimes—actually supports the judgments of administrative courts and that it is possible that this soft law affects the meaning of general principles of administrative law. However, this is not very

[150] RBAMS 28 January 2000, ECLI:NL:RBAMS:2000:AA5739. According to Principle 2(2) of Recommendation No. R (91)1 the entry into force, after the act, of less repressive provisions should be to the advantage of the person on whom the administrative authority is considering imposing a sanction.

[151] HR 3 March 2015, ECLI: NL:HR: 2015:434, AB 2015/159 (Alcoholslotprogramma).

[152] e.g., ABRvS 3 July 2002, ECLI:NL:RVS:2002:AE4855, JB 2002/242.

[153] See opinion of Attorney-General Langemeijer of 12 December 2014, ECLI:NL:HR:2014:2354.

different from the meaning of other parts of soft law, too, for instance from the *Algemene Rekenkamer* or the National Ombudsperson. Their influence on judicial decisions in administrative law is considered to be rather weak as well.[154]

VII. Reception of Pan-European General Principles of Good Administration by Promulgation of 'Codes of Good Administrative Behaviour'

7.89 In the Netherlands there are no theoretical or legal objections to incorporating the soft law of the CoE (recommendations, etc.) in national soft law documents, such as reports of the National Ombudsperson and codes of governance like the Public Accountability Code (*Code Goed Bestuur Publieke Dienstverlener*), which is a governance code for public agencies that have voluntarily agreed to join this code.[155] Thus, in theory, the influence of soft CoE law on issues of good governance should be relatively easier to achieve than influence on issues of administrative law.

7.90 However, in practice, the number of references to recommendations and other documents (with the exception of the ECHR, cf. MN. 7.43) of the CoE in reports of the National Ombudsperson turns out to be very limited, especially with regard to issues of general administrative law.[156] Thus, the soft law of the CoE does not seem to play a significant role as far as the development of general administrative law is concerned. One explanation for this limited impact might be that the approach to 'proper administration' or 'good governance' adopted by the National Ombudsperson does not correspond with the contents of the CoE recommendations, which at least partly deal with the drafting of the *legal* rules. Other explanations might be unfamiliarity with the CoE recommendations and other soft law and the different character of the soft law of the CoE compared to the ECHR.

VIII. Concluding Observations

7.91 When considering the impact of pan-European general principles of good administration in the Netherlands a clear demarcation line can be drawn between, on the one hand, the ECHR and, on the other hand, other (soft) law of the CoE—this is the 'Dutch paradox' of the legal effect given to instruments of international law. In general the Dutch legal order is assumed to be quite receptive to developments in international law. However, a closer look unveils that this reception depends on the issue of whether or not the relevant provisions of international law are self-executing, i.e., have direct effect. While all provisions of the ECHR are assumed to be self-executing this is less clear for other instruments of the CoE, to such a degree that their impact on the Dutch legal order is not self-evident.

[154] CRvB 30 June 2006, ECLI:NL:CRVB:2006:AY3870 and A.F.M. Brenninkmeijer, 'Verantwoord omgaan met publieke middelen', (2010) 30 *Overheid & Aansprakelijkheid*, pp. 50–59 (p. 52).

[155] See https://www.publiekverantwoorden.nl and Besemer (n. 24), pp. 195 et seq.

[156] As far as CoE documents are mentioned, several reports in the period 1996–2017 refer to the Council of Europe Convention on the transfer of sentenced persons or the European Agreement on regulations governing the movement of persons between Member States of the Council of Europe.

7.92 This Dutch paradox is illustrated well by the current contribution, which focused on the impact on Dutch administrative law of pan-European general principles of good administration as developed within the CoE. In that regard it should be first noted that the CoE does not provide for a coherent set of general rules of administrative law laid down in one specific document. Rather, pan-European general principles of good administration, to the extent that they exist, are scattered around in various legal documents with various legal statuses and various scopes.

7.93 Looking more closely at the impact of such CoE instruments on Dutch administrative law the following pattern can be discerned. First, it is obvious that the provisions of the ECHR and subsequent case law of the ECtHR have influenced Dutch administrative law. Especially, the guarantees of Article 6 ECHR (fair trial) and Article 1 of the First Protocol to the ECHR (protection of property) have proven to be greatly important for the development of Dutch administrative law in a general trans-sectoral way, both institutionally and procedurally. Examples thereof are debates on the independence and impartiality of the highest administrative court, the equality of arms in administrative proceedings, a trial within a reasonable term in administrative proceedings, and legal guarantees on the withdrawal of administrative decisions—all such debates have been and continue to be dominated by references to the ECHR and the case law of the ECtHR. In addition, freedom rights such as family life, speech, and association have sometimes put additional pressure on issues of general administrative law, such as access to official documents (Article 10 ECHR) and the protection of the processing of personal data (Article 8 ECHR).

7.94 Secondly, insofar as other conventions of the CoE have been signed and ratified the impact of these treaties on Dutch administrative law appears to be limited if there is an EU counterpart. This is clearly illustrated by the case study on the CoE Convention for the Protection of Individuals with regard to Automatic Data Processing, which seems to have been important in the 1980s and the beginning of the 1990s but has become less relevant since the adoption of the Directive 95/46/EC and—very recently—the EU General Data Protection Regulation. Indeed, if such counterpart EU legislation is lacking and there is no support in case law on the ECHR the impact of the CoE convention is very limited. For example, as was also shown above, the European Charter of Local Self-Government has had very limited meaning in Dutch case law because, thus far, its provisions have been supposed to be not self-executing.

7.95 Thirdly, legal instruments of the CoE other than conventions (treaties) have very limited impact on the Dutch legal order, in both legislation and in case law, since they have no binding status and usually other national or European sources are available that have stronger legal force. As far as case law refers to CoE recommendations, which is very rare in itself, this seems to happen only if these recommendations can be considered explanations or confirmations of some provision of the ECHR. Preferably, the national courts refer to the case law of the ECtHR, which has interpreted some provisions of the ECHR with reference to a recommendation or other soft law document of the CoE. Thus, the ECHR is the focal point for the further development of general principles of administrative law.

7.96 In sum, it is not really possible to perceive either a conceptual match or a conceptual mismatch between Dutch administrative law and pan-European general principles of good

administration. The wide variety of documents of the CoE containing some (hidden) building blocks for the development of general administrative law necessarily entails a wide variety of impact mechanisms, ranging from having a direct effect within the Dutch legal order to being a mere source of inspiration for Dutch administrative bodies without entailing specific legal obligations.

7.97 Another effect of the findings of this study is that the provisions of ECHR remain essential when it comes to the further development of general principles of administrative law. They can either play an autonomous role (since they have direct effect in the Dutch legal order) or they can be used indirectly when interpreting domestic general principles of administrative law. What is more, some connection with a provision of the ECHR seems to be a necessary prerequisite for deriving a general principle of administrative law from the law of the CoE. The example of the application by analogy of Protocol No. 7 and the *ne bis in idem* principle showed that this necessary connection even holds when a certain part of the ECHR has not been ratified: non-ratified 'hard law' may be even stronger than adopted soft law.

7.98 This might also be the way along which principles of good administration can evolve into principles of administrative law. As soon as the ECtHR adopts an element of good administration in its case law under the ECHR, e.g. the principle of transparency as a procedural obligation under Article 1 of the First Protocol to the ECHR,[157] it paves the way for the adoption of transparency as a general principle of administrative law.

7.99 The downside of this strong orientation towards the ECHR is that the general principles of administrative law derived from CoE instruments only provide for minimum protection. This is clearly illustrated by the case study on access to official documents: although some right of access to State-held information can be derived from Article 10 ECHR, the scope and content of this right is far more restricted than a right of access to State-held information based on the CoE Convention on Access to Official Documents, which has not yet been ratified by the Netherlands.

7.100 Thus, in answering the central question of to what extent the CoE has provided added value for the development of general principles of administrative law and of good administration in the Netherlands, it turns out that the influence of the CoE is rather weak in both areas. This is different only for the ECHR and sometimes another CoE convention, especially if there is no EU law available that regulates the same field. This does not necessarily mean that recommendations and other soft law remain completely irrelevant for the Dutch legal order. Apart from the source of inspiration that such soft law can be for the legislature it is not impossible that soft law might influence debates on legal development. In this respect it is worth emphasizing that the relatively new phenomenon of the Advocate-General facilitates reflection on the administrative issue at stake going beyond an analysis of 'hard law' only. Even though previous opinions of Advocates-General do not show such an orientation they could also take the soft law of the CoE into account. This potential impact of the soft law of the CoE holds in particular where new choices in legal development need to be made. Thus, instead of waiting for a recommendation to be ultimately codified in a convention (as has happened with several recommendations in the past) it could still be useful to

[157] See *Vékony v. Hungary* (65681/13) 13 January 2015 ECtHR.

keep an eye not only on case law with regard to the ECHR but also on other CoE documents that may be relevant for the development of general administrative law.

List of Dutch Abbreviations Used in this Chapter

AB	*Administratiefrechtelijke Beslissingen* (Dutch law report)
ABRvS	*Afdeling bestuursrechtspraak van de Raad van State* (Administrative Law Division of the Council of State)
AP	*Autoriteit Persoonsgegevens* (Data Protection Authority)
AR	*Algemene Rekenkamer* (National Court of Audit)
Awb	*Algemene wet bestuursrecht* (General Administrative Law Act)
CBb	*College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal)
CRvB	*Centrale Raad van Beroep* (Central Appeals Tribunal)
Gw	*Grondwet* (Constitution)
GHSGR	*Gerechtshof 's-Gravenhage* (Court of Appeal of Gravenhage)
GHSHE	*Gerechtshof 's-Hertogenbosch* (Court of Appeal of Hertogenbosch)
HR	*Hoge Raad der Nederlanden* (Supreme Court)
NJ	*Nederlandse Jurisprudentie* (Dutch law report)
RBAMS	*Rechtbank Amsterdam* (District Court of Amsterdam)
Trb	*Tractatenblad* (Official Journal containing international treaties ratified by the Netherlands)
VNG	*Vereniging van Nederlandse Gemeenten* (Association of Dutch Municipalities)
Wbp	*Wet bescherming persoonsgegevens* (Act on the protection of personal data)
Wob	*Wet openbaarheid van bestuur* (Freedom of Information Act)
Woo	*Wet open overheid* (Open Government Act)
Wpr	*Wet persoonsregistraties* (Act on personal registrations)